Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS R. HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause of the Fifth Amendment prevent the reassessment of sentences by intermediate appellate courts where a conviction and sentence are set aside by the Court of Military Appeals for legal error?

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

THOMAS R. HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Thomas R. Hoskins, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Military Appeals rendered in this proceeding.

OPINIONS BELOW

The unpublished order of the United States Court of Military Appeals, *United States v. Hoskins,* Dkt. No. 67486/AR (C.M.A. January 4, 1994) is reprinted as Appendix A at 1a. The Order of the United States Court of Military Appeals denying petitioner's Petition for Reconsideration, *United States v. Hoskins,* __ M.J. __, (C.M.A. February 7, 1994) is reprinted as Appendix B, at 2a. The unpublished opinion of the United States Army Court of Military Review, *United States v. Hoskins,* No. 8903849,

(A.C.M.R. November 16, 1993) is reprinted as Appendix C at 3a. The published opinion of the United States Court of Military Appeals, setting aside the findings and sentence of petitioner's case, *United States v. Hoskins,* 36 M.J. 343 (C.M.A. 1993) is reprinted as Appendix D, at 6a, and the original unpublished opinion of the United States Army Court of Military Review, *United States v. Hoskins,* No. 8903849, (A.C.M.R. November 6, 1991) is reprinted as Appendix E, at 19a.

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C., § 1259(3) (Supp. 1992). On January 4, 1994, the United States Court of Military Appeals granted discretionary review of petitioner's case, *United States v. Hoskins,* Unpublished Order, No. 67486/AR, (C.M.A. January 4, 1994), App. A, and summarily affirmed the decision of the United States Army Court of Military Appeals denying petitioner's Petition for Reconsideration. App. B.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Article 67(e) of the Uniform Code of Military Justice, [hereinafter U.C.M.J.], 10 U.S.C. § 867(e) provides:

> If the Court of Military Appeals sets aside the findings and sentence, it may . . . order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

Relevant portions of Articles 52 and 118, U.C.M.J. are reproduced as Appendix G at 34a. Rules for Courts Martial 501, 1002 and 1006 are reproduced as Appendix H at 35a.

STATEMENT OF THE CASE

During November and December, 1989, Private First Class [hereinafter PFC] Hoskins was tried at Frankfurt, Germany on a single charge of premeditated murder by a general court-martial composed of officer and enlisted members [hereinafter the jury].[1] PFC Hoskins pleaded not guilty, but nevertheless was convicted of premeditated murder. After entering a finding of guilt, petitioner's trial entered the penalty phase and the military judge instructed the jury that they could not adjudge a term of confinement, since a sentence to life imprisonment was an automatic penalty under the law for a conviction of premeditated murder. The jury adjudged a sentence of life imprisonment, reduction to paygrade E-1, forfeiture of all pay and allowances, and to be discharged from the Army with a Dishonorable Discharge.

After his court-martial, four of the six jurors on petitioner's panel expressed surprise that a sentence to confinement for life was an automatic penalty, and those four urged the convening authority to extend clemency by reducing the term of confinement to no more than 25 years.[2] The convening authority approved the sentence of the court-martial, reducing confinement to a period of 40 years.

On appeal to the United States Army Court of Military Appeals, the findings and sentence of petitioner's case

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[1] Court-martial members are the functional equivalent of a jury.

[2] One juror felt that a sentence of ten years was sufficient, while three jurors endorsed a sentence of not more than 25 years. See App. F at 6a.

were affirmed. App. E. On further appeal to the United States Court of Military Appeals, the findings and sentence of petitioner's court-martial were set aside, and petitioner was found guilty only of unpremeditated murder, which does not carry a mandatory sentence of confinement. The United States Court of Military Appeals remanded petitioner's case back to the United States Army Court of Military Review for a "reassessment" of petitioner's sentence in light of the affirmed finding of guilt as to unpremeditated murder. App. D.

On remand to the United States Court of Military Review, petitioner sought a further remand to the trial court level for a rehearing on sentence, claiming that without such a rehearing, petitioner would be denied due process of law. The United States Army Court of Military Review denied petitioner's request and reassessed petitioner's adjudged sentence to confinement, reducing approved confinement from 40 years to 30 years. App. C.

On further appeal to the United States Court of Military Appeals, that Court granted discretionary review of petitioner's case, finding the action of the Court below to be adequate as a matter of law. App. A. Petitioner sought reconsideration, which was denied. App. B.

REASONS FOR GRANTING THE WRIT

By remanding this case to the United States Army Court of Military Review for "reassessment" of petitioner's sentence, the United States Court of Military Appeals acted beyond their statutory authority mandated by Article 67(e), U.C.M.J.

The Constitution gives Congress the power to "make rules for the government and regulation of the land and naval forces". Article I, § 8, cl. 14. It has done so by enactment of the Uniform Code of Military Justice, 10 U.S.C.

§ 801, et seq. (1950, 1982 and 1988). The powers of the Courts of Military Review and the United States Court of Military Appeals are set forth at 10 U.S.C. §§ 866 and 867, respectively.

The authority of the Courts of Military Review generally includes the power of plenary, de novo review of law and fact, *United States v. Cole,* 31 M.J. 270 (CMA 1991), and review of the appropriateness of sentence. If a Court of Military Review sets aside the findings of a court-martial, it may "reassess" a sentence as a function of its statutory power to review a sentence as "correct in law and fact". Article 66(c), Uniform Code of Military Justice, 10 U.S.C. 866(c). *Jackson v. Taylor,* 353 U.S. 569, (1956).

The authority of the United States Court of Military Appeals is also prescribed by statute, and generally provides that Court with authority to exercise discretionary review on questions of law only.[3] Article 67(d), U.C.M.J., 10 U.S.C. § 867(d). Specifically, with respect to cases in which the findings and sentence of a court-martial are set aside, as here, Congress has given the United States Court of Military Appeals authority only to authorize a rehearing or to dismiss the charges. Article 867(e), U.C.M.J., 10 U.S.C. 867(e).

Specifically, Article 67(e), U.C.M.J., governs the actions the United States Court of Military Appeals may take when setting aside the findings and sentence of a court-martial, as here. That Court may either remand the case of an appellant for a "rehearing" or it may "dismiss the charges." Congress did not authorize the Court to remand cases it sets aside to an intermediate court of Military Review for "reassessment" of a sentence.

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[3] In *Noyd v. Bond,* 395 U.S. 683, 695 (1969). This Court affirmed the additional jurisdiction of the Court of Military Appeals under the All Writs Act, 28 U.S.C. § 1651(a).

"Reassessment" is not synonymous with a "rehearing." A reassessment "does not provide the accused an opportunity to be present or to offer new evidence in mitigation and extenuation," whereas a rehearing does. *United States v. Sales,* 22 M.J. 305, 307 (CMA 1986).

In *Sales,* the United States Court of Military Appeals stated that, where error occurred at the trial level as to findings or sentence a Court of Military Review may reassess the accused's sentence, if it is convinced that, even if no error had occurred at the trial level, an accused's sentence would have been at least of a certain magnitude. *Id.,* at 307. In such a case, it may adjudge no greater sentence than the court-martial would have, had the error not occurred.

Since *Sales,* the Court of Military Appeals has remanded the cases of many military members to the Courts of Military Review for sentence reassessment, and petitioner is unaware of any case in which the practice has been challenged on due process grounds.

More recently in *United States v. Peoples,* 29 M.J. 426 (CMA 1990), the United States Court of Military Appeals set aside the appellant's sentence as reassessed by the Court of Military Review, finding that it was not convinced that the Court of Military Review could accurately have determined what, if any, sentence Peoples would have been adjudged, absent the prejudicial error. In such cases, the Court of Military Appeals stated, "the only fair course of action" is to allow the accused a rehearing on sentence at the trial level. *Id.* at 429.

Military justice is a highly particularized system with many provisions which do not exist in the non-military context. As an example, in the military, sentencing is by

the jury,[4] and Article 52, U.C.M.J., 10 U.S.C. § 852 provides that no person may be sentenced to confinement for more than ten years unless three-fourths of the jurors concur. App. G at 34a.

Here, petitioner, if initially charged and convicted only of unpremeditated murder, would have been entitled to have his jury instructed that they could adjudge a sentence ranging from no punishment to confinement for life, since that is the range of punishment permissible under the provisions of the Manual for Courts-Martial (1984) for unpremeditated murder. Article 118(2), U.C.M.J., 10 U.S.C. § 918(2), App. G at 34a, and R.C.M. 1002 reprinted at App. H. Instead, petitioner was erroneously convicted of premeditated murder for which an automatic sentence to confinement for life is mandated under Article 118(4) of the U.C.M.J., 10 U.S.C. § 918(4). Had petitioner's jury been properly instructed on unpremeditated murder, it is clear that the three-fourths of the jurors necessary to adjudge a sentence in excess of ten years under Article 52, U.C.M.J., 10 U.S.C. § 852, would have adjudged a sentence to confinement of no more than 25 years. App. F and G at 31a and 34a.

The Court of Military Review, however, reassessed petitioner's sentence in an amount 25 percent greater than petitioner's jury would have adjudged if they had been allowed to do so!

> This Court has held that "the Due Process clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct which 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of

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[4] Unless an accused has elected to be tried by judge alone. See Rules for Courts-Martial, (hereafter R.C.M.) 501, 1002 and 1006, reprinted at App. H.

> ordered liberty' (citation omitted). When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a **fair manner** . . . This requirement has traditionally been referred to as 'procedural' due process." *United States v. Salerno,* 481 U.S. 739, 746 (1987). (emphasis added)

Although this case appears similar to *Jackson v. Taylor, supra,* decided by this Court 38 years ago, it is dissimilar in several respects, which in the aggregate, warrant a grant of certiorari here.

1. Jackson did not assert a constitutional basis for his argument, *id.* at 572. Petitioner here relies upon the Due Process clause of the Fifth Amendment, asserting that he has been denied procedural due process by the remand of the United States Court of Military Appeals to the Army Court of Military Review for reassessment; an action petitioner asserts is beyond the statutory authority of the former Court which, upon setting aside findings and sentence of a court-martial, may only remand a case for "rehearing", or dismiss the charges.

2. The Court's reasoning in *Jackson* relied heavily upon the fact that the U.C.M.J. was silent as to rehearings on sentence, citing the "impossibility of remand to the same court-martial", and noting that "Congress thought the Board of Review could modify sentences when appropriate more expeditiously, more intelligently and more fairly". *Id.* at 580. In fact, since *Jackson,* Congress has expressly given the Court of Military Appeals authority to remand cases for rehearing, or to dismiss the charges under circumstances present here, under Article 67(e) 10 U.S.C. § 867(e).

3. In *Jackson,* the process unsuccessfully challenged was the practice of the Boards of Review to reassess a sentence when setting aside the findings or sentence of a

court-martial it found to be incorrect in law or fact. Here, petitioner is challenging the action of the Court of Military Appeals, rather than the Courts of Military Review.

4. Since the decision in *Jackson,* military justice has developed substantially with the implementation of a Manual for Courts-Martial, Rules for Courts-Martial, Military Rules of Evidence, and substantial due process protections, such as the right to counsel, which did not exist at the time *Jackson* was decided. Because petitioner is here alleging a denial of procedural due process, he may rely upon all of those statutes and regulations which previously did not exist, to establish the minimum due process he is due.

5. This Court, in *Jackson,* noted the "impracticality" of requiring that a new court-martial be empaneled. *Id.* at 580. Since that decision, however, the entire structure of the military justice system has been dramatically overhauled, including the Military Justice Act of 1968, which created the military bench *in toto*. While it may have been impractical to provide a rehearing in every case set aside on appeal in 1956, such is certainly no longer the case, given the value placed upon due process rights in the intervening years.

6. In *Jackson,* there was no way to determine what, if any sentence Jackson would have received if convicted only of the attempted rape, since he received the automatic sentence to confinement for life for an aggravated murder conviction and in the military, sentencing is in "gross" for all offenses. Here, by virtue of the post trial clemency recommendations of the jurors, it is clear that this petitioner received a reassessed sentence to confinement in excess of that which the jurors would have adjudged for a premeditated murder. In other words, the prejudice to this petitioner can be clearly articulated.

Petitioner asserts that the practice of the United States Court of Military Appeals to remand cases which are legally insufficient to the service Courts of Military Review for sentence reassessment is beyond the statutory authority of that Court. Nowhere has Congress authorized that Court to undertake any action other than ordering a rehearing, or dismissal of the charges when it sets aside the findings and sentence of a court-martial for legal error. "Rehearing" is a term of obvious meaning and is clearly distinguishable from the term "reassessment", which lacks the procedural due process inherent in a rehearing. *Sales, supra,* at 307.

CONCLUSION

Petitioner seeks a Grant of this Petition for Certiorari to obtain an opportunity to have a jury determine his sentence for an unpremeditated murder, an opportunity which he has been denied to date. Petitioner demonstrates prejudice by the imposition here of a punishment on re-assessment which is obviously greater than petitioner would have received had his jury adjudged his sentence for a **premeditated murder.** Such an action by the United States Army Court of Military Review, under these facts, is tantamount to an increase in petitioner's sentence, which the Army Court is forbidden by statute from accomplishing.

Petitioner seeks a grant of this Petition for Certiorari additionally to challenge the current practice of the United States Court of Military Appeals in remanding for re-assessment those cases which, by statute, that Court may only order a rehearing upon.

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 67486/AR
CMR Dkt. No. 8903849

UNITED STATES, APPELLEE

v.

THOMAS R. HOSKINS, JR. (590-32-9326), APPELLANT

ORDER

On consideration of the petition of for grant of review of the decision of the United States Army Court of Military Review, on further review, we are satisfied that the action taken by the court below was adequate as a matter of law. Accordingly, it is, by the Court, this 4th day of January, 1994

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Army Court of Military Review, on further review, is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 67486/AR
CMR Dkt. No. 8903849

THOMAS R. HOSKINS, JR. (590-32-9326), APPELLANT

v.

UNITED STATES, APPELLEE

ORDER

On consideration of appellant's petition for reconsideration of the order of the Court issued on January 4, 1994, it is, by the Court, this 7th day of February, 1994,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX C

UNITED STATES ARMY
COURT OF MILITARY REVIEW

Before
DE GIULIO, WALCZAK, and GONZALES
Appellate Military Judges

ACMR 8903849

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS THOMAS R. HOSKINS, JR.,
590-32-9326, UNITED STATES ARMY, APPELLANT

V Corps
J. B. Thwing, C. C. Jacobsen, Military Judges

For Appellant: Dan R. Hyatt, Esquire (argued), Captain Deborah C. Olgin, JAGC (on brief); Captain Robert Lane Carey, JAGC.

For Appellee: Captain John J. Carroll, III, JAGC (argued), Colonel Dayton M. Cramer, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Thomas E. Booth, JAGC USAR, Major Edith M. Rob, JAGC (on brief); Major Joseph C. Swetnam, JAGC, Captain Jane F. Polcen, JAGC.

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21 June 1993

MEMORANDUM OPINION ON REMAND

Per Curiam:

Appellant was tried by general court-martial composed of officer and enlisted members. Contrary to his plea, he was found guilty of premeditated murder in violation of Article 118, Uniform Code of Military Justice. He was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to Private E1. The court recommended clemency with regard to confinement. The convening authority reduced the confinement to forty years but otherwise approved the sentence. This Court affirmed the sentence. *United States v. Hoskins,* ACMR 8903849 (A.C.M.R. 6 Nov 1991) (unpub).

On 11 March 1993, the United States Court of Military Appeals reversed this court's decision as to the Specification to the extent that it alleged premeditated murder and the sentence, set aside the finding of guilty of premeditated murder, dismissed that portion of the specification, affirmed this court's decision as to the Specification to the extent that the specification alleges unpremeditated murder, and ordered the case be submitted to this court for reassessment of the sentence based upon the affirmed findings. *United States v. Hoskins,* 36 M.J. 343 (C.M.A. 1993). On 16 April 1993, after receiving the case, this court gave appellant an opportunity to file additional pleading. Time for filing was extended until 2 June 1993 upon motion of appellant.

On 2 June 1993, appellant filed a motion to remand the case for a sentence rehearing in addition to a motion to recuse this panel from reassessing his sentence. The government filed an opposition to the motion. On 8 June 1993, appellant's motion was denied. On 14 June 1993, appellant moved for reconsideration of the motion and suggested that the case be considered en banc. On 18 June

1993, the motion for reconsideration was denied and the suggestion for en banc consideration was not adopted. The time for filing has expired and no further pleading has been received.

Reassessing the sentence on the basis of the findings affirmed by the United States Court of Military Appeals, the entire record, and *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986), only so much of the sentence is affirmed as provides for a dishonorable discharge, confinement for thirty years, forfeiture of all pay and allowances, and reduction to Private E1.

FOR THE COURT:

/s/ William S. Fulton, Jr.

WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX D

U.S. COURT OF MILITARY APPEALS

No. 67,486
CM 8903849

UNITED STATES, APPELLEE

v.

THOMAS R. HOSKINS, JR., PRIVATE FIRST CLASS
590-32-9326, U.S. ARMY, APPELLANT

For Appellant: *Dan R. Hyatt* (argued); *Captain Robert Lane Carey* (on brief).

For Appellee: *Captain Jane F. Polcen* (argued); *Colonel Dayton M. Cramer, Lieutenant Colonel Daniel J. Deli'-Orto, Major Edith M. Rob,* (on brief); *Major Thomas E. Booth.*

Argued Nov. 3, 1992.
Decided March 11, 1993.

Opinion of the Court

Cox, Judge.

Appellant stands convicted of premeditated murder. The granted issue asks whether the evidence is legally sufficient to sustain the conviction. We must determine

whether a reasonable factfinder could have found all the elements of the offense beyond a reasonable doubt; and in reviewing for legal sufficiency, we must consider the evidence in the light most favorable to the Government. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Turner,* 25 MJ 324 (CMA 1987).[1]

FACTS

In its memorandum opinion, the Court of Military Review summarized the relevant facts as follows:

> On 8 September 1989, appellant and four other members of his military police unit were assigned to guard ammunition which was being shipped by rail in Germany. Sergeant (SGT) Gibbs was the "guard commander." The soldiers lived in a guard car, a train car which was divided into several compartments: a shower, restrooms, kitchen, sink room, dayroom, seven sleeping compartments and a generator room. Private First Class (PFC) Haney, the victim, and Private (PVT) Hawley, the only female soldier on the mission, occupied the first sleeping compartment. SGT Gibbs, appellant, and PVT Tatay occupied the second sleeping compartment. The

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[1] Appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 USC § 918. Appellant was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to Private E-1. The convening authority reduced the period of confinement to 40 years but otherwise approved the sentence; the Court of Military Review affirmed the findings and the approved sentence.

remaining sleeping compartments were used for storage or were unoccupied. On 22 September 1989, the train was on a railroad siding in Sythen, Germany. SGT Gibbs permitted appellant, PVT Tatay, and PVT Hawley to go into the nearby town to eat. Although drinking alcohol was prohibited while on the guard mission, the three soldiers purchased two bottles of brandy and ate dinner at an establishment. At dinner, appellant and PVT Tatay drank five beers each and PVT Hawley drank three beers. On the way back to the train, the three soldiers drank about half of one of the bottles of brandy. Upon arrival, they gave the remaining bottles of brandy to SGT Gibbs and PFC Haney. The five soldiers sat outside the guard car and drank. PVTs Hawley and Tatay became sick and went inside the second sleeping compartment. Appellant was put to bed in the first sleeping compartment by SGT Gibbs and PFC Haney.[2] PVT Tatay became ill and SGT Gibbs and PVT Hawley held him up so he could vomit out the window of the car. PFC Haney began to taunt PVT Tatay by saying that PVT Tatay "could not hang," PVT Tatay "needed a female to put him to bed," and that PVT "Tatay needed to go outside so he could teach him a lesson." SGT Gibbs and PVT Hawley restrained Tatay from exiting the compartment. At some point SGT Gibbs locked PFC Haney outside the compartment. PFC Haney continued to taunt PVT Tatay. Appellant approached PFC Haney three or four

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[2] Appellant was so intoxicated that Sergeant Gibbs and PFC Haney had to undress him and put him to bed.

times telling him to calm down and forget it. This was observed by SGT Gibbs through the compartment windows.[3] According to PVT Hawley, PFC Haney told appellant to go back to bed, stated "do you want a piece of me now" and "nudged" appellant with his chest. Subsequently, a gunshot was heard. SGT Gibbs unlocked the compartment door. PFC Haney stated, "He shot me Gibbs, he shot me." SGT Gibbs saw appellant standing near the doorway of the dayroom with a .45 pistol in his hand and about ten to twelve feet from PFC Haney. SGT Gibbs ordered appellant to put the pistol down. SGT Gibbs withdrew his head inside the compartment as three additional shots were fired by appellant.[4] SGT Gibbs again told appellant to put the pistol down. Appellant answered, "Hell, the gun is down."[5] Later,

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[3] Sergeant Gibbs was inside the sleeping compartment which has a door that is glass from the waist up. The walls of the compartment are thin, and what was said outside the compartment could be heard. During the commotion outside the compartment, Sergeant Gibbs was physically restraining PVT Tatay from starting a fight with PFC Haney by sitting on him and holding him down. At one point, PVT Tatay shoved Sergeant Gibbs against PVT Hawley. Sergeant Gibbs was unable to verbally control his subordinates.

As a consequence of his own derelictions that evening, Sergeant Gibbs himself was court-martialed. In exchange for his pleas of guilty to numerous offenses, the Government agreed to drop certain other charges and to limit his sentence.

[4] After he shut the door, Sergeant Gibbs "grabbed PVT Hawley because she was hysterical."

[5] Sergeant Gibbs' testimony does not clarify the amount of time between the first shot and the subsequent three. The record repeatedly notes the witness' description of the timing of shots as "Bang, [one second pause] bang, bang, bang [consecutively]." On each occasion the record reflects a pause of one second. Sergeant Gibbs testified that he

SGT Gibbs found the pistol on the table in the dayroom. He took the magazine from the pistol. He took the pistol belts, which contained all the ammunition for the pistols, from the gun rack and tossed them under the railroad car.

Appellant was then observed by PVTs Tatay and Hawley putting on his shorts in the "sink room." He stated to them that PFC Haney was dead and that "he didn't have to put up with this kind of shit where he came from, and not to worry because they weren't going to be in trouble." When SGT Gibbs reentered the car, appellant was smoking a cigarette and stated, "I killed him, I killed him." Appellant did not attempt to render first aid to PFC Haney. SGT Gibbs handcuffed appellant to the window. He and PVT Hawley rendered first aid to PFC Haney.

Medical personnel and police arrived at the scene. PFC Haney was taken to a hospital. He had a gunshot wound to the chest, the abdomen and to the thigh. Eight days later, PFC Haney died as a result of the gunshot wounds.

The main thrust of appellant's defense was self defense and defense of another. In his defense,

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heard the shot, stuck his head out of the compartment, closed the compartment door, told appellant to put the gun down, and then appellant fired three more shots. He said "all of this happened so quick." Yet when asked to estimate the interval between the first and second shots, Sergeant Gibbs replied, "Between 10 and 20 seconds I would imagine. Everything just happened so fast." He subsequently admitted that he could not precisely "quantify" the period in seconds. However, premeditated design need not be "entertained for any particular . . . length of time." *United States v. Teeter,* 16 MJ 68, 71 (CMA 1983). *See also* para. 43c(2)(a), Part IV, Manual for Courts-Martial, United States, 1984.

> he testified that he had been drinking, went to sleep in the compartment, and was awakened by noise in the next compartment. He saw PFC Haney jerking on the other compartment door shouting, "You need a woman, you need a woman." He believed Haney was very angry. He thought the statements by PFC Haney were sexual comments directed at PVT Hawley because of prior crude sexual comments by Haney directed to Hawley. He believed PFC Haney was going to rape Hawley. He also thought PFC Haney was trying to kill PVT Tatay. Appellant approached Haney and told him to stop. He stated that PFC Haney threatened to "kick [Tatay's] head in" and stated, "I'm going to kill the little bastard." PFC Haney threatened "to kick my ass" and asked, "Do you want some of me." He shoved appellant down the hall and into the dayroom where he fell down. Appellant grabbed a pistol from the gun rack and "charged it." He testified that he approached PFC Haney thinking PFC Haney wouldn't attack him because he had a gun. When Haney saw the gun, he became very angry and stated "if you shoot me you better kill me." He testified PFC Haney continued to jerk on the compartment door. When he told PFC Haney to stop, PFC Haney turned on him, stated "I'll take that gun and I'll blow your god damn head off," and swung at appellant. He testified that the blow missed his face, just grazing him. He backed up and fired until PFC Haney stopped coming at him.

Unpub. op. at 2-4.

DISCUSSION

We next apply this evidence to the elements of premeditated murder. Those are:

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

Para. 43b(1), Part IV, Manual for Courts-Martial, United States, 1984. The Manual further provides:

> A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone *and consideration of the act intended.* It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

Para. 43c(2)(a) (emphasis added). *See United States v. Teeter,* 16 MJ 68, 71 (CMA 1983); *United States v. Ayala,* 22 MJ 777, 797 (ACMR 1986), *aff'd,* 26 MJ 190 (CMA 1988). "The words consideration of the act intended to bring about death' are not terms of art. They have ordinary meanings." *United States v. Teeter,* 16 MJ at 72.

As the Court of Military Review stated in *United States v. Viola,* 26 MJ 822, 829 (ACMR 1988), *aff'd,* 27 MJ 456

(CMA 1988) (sum. disp.), *cert. denied,* 490 U.S. 1020, 109 S.Ct. 1744, 104 L.Ed.2d 181 (1989):

> Intent to kill alone is insufficient to sustain a conviction for premeditated murder. *See* W. LaFave and A. Scott, *Criminal Law,* § 73 (1972). *See also* F. Bailey and H. Rothblatt, *Crimes of Violence: Assault and Homicide,* § 550 (1973), *and* C. Torcia, *Wharton's Criminal Law,* (14th ed.), § 140 (1979). To sustain such a conviction, the killing must have been committed after reflection by a cool mind. *Id.*

See also United States v. Cooper, 28 MJ 810, 816 (ACMR 1989), *aff'd,* 30 MJ 201 (CMA 1990). We must find that there is more than evidence of intent before we can affirm the decision below in this case; what we must also find is evidence of a "premeditated design to kill." Premeditation requires that one with a cool mind did, in fact, reflect before killing. W. LaFave and A. Scott, *Substantive Criminal Law* § 7.7(a) (1986):

> It has been suggested that for premeditation the killer asks himself the question, "Shall I kill him?" The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway."

Id. at 237 n.6.

The facts of this case are sufficient for a reasonable factfinder to infer intent. However, we are troubled by the paucity of evidence of prior "consideration of the act intended." Para. 43c(2)(a). We note that the forensic pathologist who performed the autopsy on the deceased found only three bullet wounds. One struck the deceased's left center chest; a second hit his mid abdomen; and a

third hit his right thigh. The chest wound resulted in his death; however, the firing sequence could not be determined.

As the pathologist testified:

> I don't think there's grounds to make an assumption on sequence of fire other than the wound in the abdomen was probably the middle one. The way these wounds are distributed suggests that either the person firing was on the radius of a circle or the victim turned while he was being shot. So if the chest wound were first, then as he turned to the left, the abdominal wound came second and he continued to turn to the left and then the leg wound was third. But if you reverse the order, if he'd been roughly facing right side toward the shooter, [he would] ha[ve] gotten the leg wound first, then the abdominal wound, and then the chest wound last. Either one is a reasonable explanation for what I see from my viewpoint.

In this case, we can detect *no* evidence from which the factfinder could infer that appellant "premeditated" *before* firing the first shot. The Government's primary witness, Sergeant Gibbs, gave internally inconsistent testimony. While circumstantial evidence, such as evidence of planning the activity or evidence of motive, may be used to prove premeditation, there was no such proof here. Granted, as the dissenters point out, it is possible that the members inferred premeditation *after* the first shot, but *before* the second, third and fourth shots. *See* n.[5], *supra.* However, the uncontroverted evidence in this case is that only one of the wounds was fatal; therefore, the evidence must prove that appellant premeditated *before* inflicting that wound. In other words, for the conviction to be sus-

tained, the evidence must show that the fatal wound was *not* a result of the first shot. We are simply unable to conclude, on this record, that there is sufficient evidence that appellant, with a cool mind, reflected on the consequences of his actions before firing the first shot.

Therefore, we hold, as a matter of law, that the evidence is insufficient to sustain appellant's conviction of premeditated murder.

The decision of the United States Army Court of Military Review is reversed as to the specification of the Charge to the extent that it alleges premeditated murder and the sentence. The finding of guilty of premeditated murder is set aside, and that portion of the specification is dismissed. The decision below is affirmed as to this specification to the extent that it alleges unpremeditated murder. The record of trial is returned to the Judge Advocate General of the Army for submission to that court for reassessment of the sentence based on the affirmed findings.

Judges GIERKE and WISS concur.

SULLIVAN, Chief Judge (dissenting):

The question before this Court is one of law, not fact. *See United States v. Harper,* 22 MJ 157, 161 (CMA 1986). More particularly, it is whether there was sufficient evidence from which a reasonable factfinder could "find or infer beyond a reasonable doubt" that appellant killed his victim with premeditation. I note that premeditation can be shown by evidence of the circumstances surrounding the killing. *See United States v. Teeter,* 16 MJ 68 (CMA 1983); *United States v. Ayers,* 14 USCMA 336, 34 CMR 116 (1964). Accordingly, for the reasons noted below, I disagree with the majority opinion's insufficiency-of-the-evidence holding.

First, the majority opinion holds that the evidence in this record indicates an absence of planning and motive. However, the majority has cited no authority, and I cannot find any authority, for requiring such proof to show premeditation. Moreover, regarding proof of motive, this Court has expressly held that this type of evidence is not required to show intent. *See United States v. Varraso,* 21 MJ 129, 134 (CMA 1985), *cert. denied,* 475 U.S. 1124, 106 S.Ct. 1645, 90 L.Ed.2d 190 (1986). In any event, there was ample evidence in this case that appellant's peacemaking efforts had been unceremoniously rejected by the victim who further challenged him to fight.

Second, the majority opinion also finds no other relevant evidence that appellant premeditated the murder. However, the record shows that multiple shots were fired at the victim which in itself is some evidence of premeditation. *See United States v. Teeter,* 16 MJ at 71; *United States v. Ayers,* 14 USCMA at 343, 34 CMR at 123; *United States v. Thomas,* 6 USCMA 92, 96-97, 19 CMR 218, 222-23 (1955). Moreover, there was some evidence that appellant fired his last 3 shots some 10 to 20 seconds after Sergeant Gibbs told him to put his gun down. *See United States v. Ransom,* 4 USCMA 195, 201, 15 CMR 195, 201 (1954). This evidence, coupled with the previously noted evidence of motive, was sufficient to permit a rational finding of premeditation.

Nevertheless, the majority opinion strictly requires proof of premeditation *before* the first shot. It bases this requirement on "uncontroverted evidence . . . that only one of the wounds was fatal." 36 MJ at 347. This single-bullet theory, however, is not uncontroverted in the record.

In this case, there was ample evidence that the victim did not die instantaneously from the first shot. In fact he died in a hospital eight days after the shooting. Moreover,

Dr. Hause, a government witness and the forensic pathologist who performed the autopsy on the victim, testified that "[t]he accused's [sic] death was caused by *three* gunshot wounds." (Emphasis added.) The autopsy report similarly listed the "CAUSE OF DEATH" as "Multiple Gunshot Wounds." Dr. Hause also defined "cause of death" as "that event or disease process which sets in motion a chain of physiologic alterations which lead to death." While testifying during direct examination, he described "[t]he mechanism [of death], *at least partially,* is that the wound that Haney had through his chest passed through his sac that surrounds his heart[.]" (Emphasis added.) Therefore, there was also legally sufficient evidence presented to the members from which they could find or infer that all three gunshot wounds together set into motion the physiologic alterations which led to Haney's death.

CRAWFORD, Judge (dissenting):

I agree with the Chief Judge's analysis of the evidence in his dissenting opinion and write only to underscore the standard of review which federal appellate courts should apply.

In my view, under the *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard, the facts of this case are sufficient for a reasonable factfinder to infer premeditation, and in fact a panel composed of officer and enlisted members did so.

As an appellate court we are not asked whether we believe one set of circumstances over another set of circumstances. As a factfinder in this case, I might have reached a different conclusion. But an appellate court is not a factfinder. Under the *Jackson* standard all reasonable inferences are to be drawn in favor of the Govern-

ment; that includes the reasonable inference that it was the last shot which was the fatal shot in this particular case. We should reaffirm the *Jackson* standard to ensure predictability and finality. Therefore, I respectfully must dissent.

APPENDIX E

UNITED STATES ARMY
COURT OF MILITARY REVIEW

Before
DE GIULIO, HAESSIG, and ARKOW
Appellate Military Judges

ACMR 8903849

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS THOMAS R. HOSKINS, JR.,
590-32-9326, UNITED STATES ARMY, APPELLANT

V Corps
J. B. Thwing and C. C. Jacobsen, Military Judges

For Appellant: Dan R. Hyatt, Esquire (argued), Captain Deborah C. Olgin, JAGC (on brief).

For Appellee: Captain John J. Carroll, III, JAGC (argued), Colonel Dayton M. Cramer, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Thomas E. Booth, JAGC, Captain Edith M. Rob, JAGC (on brief).

[6 Nov. 1991]

MEMORANDUM OPINION

Per Curiam:

Appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was found guilty of premeditated murder in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 (1982) [hereinafter UCMJ]. He was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to Private E1. The court recommended clemency with regard to confinement. The convening authority reduced the confinement to forty years but otherwise approved the sentence.

Appellant asserts the following errors:

I.

THE EVIDENCE DOES NOT SHOW BEYOND A REASONABLE DOUBT THAT APPELLANT WAS NOT ACTING IN SELF DEFENSE OR IN DEFENSE OF ANOTHER.

II.

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE PREMEDITATED MURDER.

III.

APPELLANT'S DEFENSE COUNSEL WAS INEFFECTIVE DENYING APPELLANT A FAIR TRIAL.

IV.

THE MILITARY JUDGE ERRED IN FAILING TO INSTRUCT SUA SPONTE ON THE

LIMITED PURPOSE FOR WHICH THE MEMBERS COULD CONSIDER THE GIBBS STIPULATION OF FACT.

V.

THE TRIAL COUNSEL ENGAGED IN MISCONDUCT OF SUCH GRAVITY THAT APPELLANT WAS DENIED A FAIR TRIAL.

VI.

THE STAFF JUDGE ADVOCATE'S ADVICE WAS INSUFFICIENT AS A MATTER OF LAW IN FAILING TO DISCUSS THE RECOMMENDATIONS OF THE MEMBERS FOR SUBSTANTIAL CLEMENCY POST TRIAL.

We disagree and affirm.

On 8 September 1989, appellant and four other members of his military police unit were assigned to guard ammunition which was being shipped by rail in Germany. Sergeant (SGT) Gibbs was the "guard commander." The soldiers lived in a guard car, a train car which was divided into several compartments: a shower, restrooms, kitchen, sink room, dayroom, seven sleeping compartments and a generator room. Private First Class (PFC) Haney, the victim, and Private (PVT) Hawley, the only female soldier on the mission, occupied the first sleeping compartment. SGT Gibbs, appellant, and PVT Tatay occupied the second sleeping compartment. The remaining sleeping compartments were used for storage or were unoccupied. On 22 September 1989, the train was on a railroad siding in Sythen, Germany. SGT Gibbs permitted appellant, PVT Tatay, and PVT Hawley to go into the nearby town to eat.

Although drinking alcohol was prohibited while on the guard mission, the three soldiers purchased two bottles of brandy and ate dinner at an establishment. At dinner, appellant and PVT Tatay drank five beers each and PVT Hawley drank three beers. On the way back to the train, the three soldiers drank about half of one of the bottles of brandy. Upon arrival, they gave the remaining bottle of brandy to SGT Gibbs and PFC Haney. The five soldiers sat outside the guard car and drank. PVTs Hawley and Tatay became sick and went inside the second sleeping compartment. Appellant was put to bed in the first sleeping compartment by SGT Gibbs and PFC Haney. PVT Tatay became ill and SGT Gibbs and PVT Hawley held him up so he could vomit out the window of the car. PFC Haney began to taunt PVT Tatay by saying that PVT Tatay "could not hang," PVT Tatay "needed a female to put him to bed," and that PVT "Tatay needed to go outside so he could teach him a lesson." SGT Gibbs and PVT Hawley restrained Tatay from exiting the compartment. At some point SGT Gibbs locked PFC Haney outside the compartment. PFC Haney continued to taunt PVT Tatay. Appellant approached PFC Haney three or four times telling him to calm down and forget it. This was observed by SGT Gibbs through the compartment windows. According to PVT Hawley, PFC Haney told appellant to go back to bed, stated "do you want a piece of me now" and "nudged" appellant with his chest. Subsequently, a gunshot was heard. SGT Gibbs unlocked the compartment door. PFC Haney stated, "He shot me Gibbs, he shot me." SGT Gibbs saw appellant standing near the doorway of the dayroom with a .45 pistol in his hand and about ten to twelve feet from PFC Haney. SGT Gibbs ordered appellant to put the pistol down. SGT Gibbs withdrew his head inside the compartment as three additional shots were fired by appellant. SGT Gibbs again told appellant to

put the pistol down. Appellant answered, "Hell, the gun is down." Later, SGT Gibbs found the pistol on the table in the dayroom. He took the magazine from the pistol. He took the pistol belts, which contained all the ammunition for the pistols, from the gun rack and tossed them under the railroad car.

Appellant was then observed by PVTs Tatay and Hawley putting on his shorts in the "sink room." He stated to them that PFC Haney was dead and that "he didn't have to put up with this kind of shit where he came from, and not to worry because they weren't going to be in trouble." When SGT Gibbs reentered the car, appellant was smoking a cigarette and stated, "I killed him, I killed him." Appellant did not attempt to render first aid to PFC Haney. SGT Gibbs handcuffed appellant to the window. He and PVT Hawley rendered first aid to PFC Haney.

Medical personnel and police arrived at the scene. PFC Haney was taken to a hospital. He had a gunshot wound to the chest, to the abdomen and to the thigh. Eight days later, PFC Haney died as a result of the gunshot wounds.

The main thrust of appellant's defense was self defense and defense of another. In his defense, he testified that he had been drinking, went to sleep in the compartment, and was awakened by noise in the next compartment. He saw PFC Haney jerking on the other compartment door shouting, "You need a woman, you need a woman." He believed Haney was very angry. He thought the statements by PFC Haney were sexual comments directed at PVT Hawley because of prior crude sexual comments by Haney directed to Hawley. He believed PFC Haney was going to rape Hawley. He also thought PFC Haney was trying to kill PVT Tatay. Appellant approached Haney and told him to stop. He stated that PFC Haney threatened to "kick [Tatay's] head in" and stated, "I'm going to kill the little bastard." PFC Haney threatened "to kick my ass"

and asked, "Do you want some of me." He shoved appellant down the hall and into the dayroom where he fell down. Appellant grabbed a pistol from the gun rack and "charged it." He testified that he approached PFC Haney thinking PFC Haney wouldn't attack him because he had a gun. When Haney saw the gun, he became very angry and stated "if you shoot me you better kill me." He testified PFC Haney continued to jerk on the compartment door. When he told PFC Haney to stop, PFC Haney turned on him, stated "I'll take that gun and I'll blow your god damn head off," and swung at appellant. He testified that the blow missed his face, just grazing him. He backed up and fired until PFC Haney stopped coming at him.

Legal and Factual Sufficiency

Addressing appellant's challenge to the legal sufficiency of the evidence, the test is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). Applying this test, we find the evidence legally sufficient to support the findings of guilty of premeditated murder.

Under our responsibility set forth in Article 66(c), UCMJ, to determine if the evidence is factually sufficient, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that appellant was not acting in self defense or defense of another. We also find beyond a reasonable doubt that appellant was not so intoxicated as to prevent him from forming the specific to kill or render him unable to premeditate. Further, we are convinced beyond a reasonable doubt of appellant's guilt of premeditated murder. *See United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

Ineffective Assistance of Counsel

Appellant asserts that his counsel was ineffective. His allegation is in three parts. He alleges that counsel was ineffective by failing to request a new Article 32 investigation when the investigating officer was the unit PAO and had prior knowledge of the case. He further asserts that counsel failed to object to or request a cautionary instruction on a stipulation of fact by SGT Gibbs, failed to object to improper argument by trial counsel, and failed to object to questions concerning appellant's conduct after the shooting. He also asserts that counsel was ineffective in failing to obtain or offer expert testimony on the issue of intoxication.

The test for ineffective assistance of counsel is two-pronged. In order to prevail on an ineffective assistance of counsel claim, appellant must show that counsel was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the sixth amendment. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984); *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987). Having satisfied this prong, an appellant must show that counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. *Id.* The test "is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Scott,* 24 M.J. at 189, *quoting Strickland,* 466 U.S. at 695. In alleging ineffective assistance of counsel, appellant must overcome the strong presumption that the challenged acts were trial strategy. *Strickland,* 466 U.S. at 689. Deference must be given to counsel's tactical judgment during trial; our judgment with the benefit of hindsight should not be substituted. *See United States v. Bono,* 26 M.J. 240, 242 (C.M.A. 1988).

In the case before us, the investigating officer was the unit public affairs (PAO) officer. He disclosed that in his capacity as PAO, he received word PFC Haney had been shot, that PFC Haney was in serious condition, and that appellant was arrested as a suspect. In an affidavit admitted before this Court, trial defense counsel stated that, although the PAO was challenged at the Article 32 hearing, counsel had no cause to doubt either the investigating officer's impartiality throughout the investigation or his sincerity in stating that he could set aside any prior facts he had heard. Under the circumstances, trial defense counsel considered a challenge to the Article 32 investigation at trial would be frivolous and a waste of time.

We find that the counsel observed the demeanor and sincerity of the investigating officer, evaluated the evidence against appellant at the time of trial, concluded that nothing would be gained by a new investigation and made a reasoned decision not to move for a new investigation. *See United States v. Donley,* 33 M.J. 44, 47-48 (C.M.A. 1991). Counsel's performance was not deficient in this respect.

Appellant also alleges that counsel was ineffective because he failed to obtain an expert to testify as to the effects of alcohol on the human body. It is clear from the record that the defense considered self defense and defense of another as the main thrust of the defense. Counsel also presented evidence of intoxication. Indeed, the military judge instructed the court on all the defenses raised by the evidence, to include voluntary intoxication. A trial defense counsel is under no general duty to call an expert witness. *See generally United States v. Hattermann,* 853 F.2d 555, 559 (7th Cir. 1988); *Harich v. Dugger,* 844 F.2d 1464, 1472 (11th Cir. 1988); *Jones v. Butler,* 837 F.2d 691 (5th Cir. 1988). We find no error in failing to call an unknown expert because of the tactical decision to emphasize self

defense and defense of another. *See Strickland,* 466 U.S. at 689; *see also United States v. Stephenson,* 33 M.J. 79 (C.M.A. 1991).

In conjunction with his other assignments of error, appellant has also alleged ineffective assistance of counsel. These remaining assertions will be addressed with the substantive issues to which they relate.

Considering all the allegations of ineffective assistance of counsel as a whole, we hold appellant has not met the burden required by *Strickland.* Our view is the same as that adopted by Judge Wilkins in *Donley.* "[I]n the final analysis they have as a bedrock the hindsight quibbling over trial tactics which are not a sufficient basis to warrant post conviction relief. The actions and decisions of the trial [defense] counsel are not to be measured in terms of results." *Donley,* 33 M.J. at 48, *quoting Shaw v. State,* 277 S.E.2d 140, 142 (Ala. 1981). Counsel was not ineffective in his representation of appellant.

SGT Gibbs' Stipulation of Fact

During appellant's trial, SGT Gibbs was called as a government witness. SGT Gibbs had previously pleaded guilty at his own court-martial and executed a stipulation of fact. Appellant's counsel used the stipulation during cross-examination to impeach SGT Gibbs' testimony. Government counsel subsequently moved for admission of the stipulation of fact into evidence. Appellant alleges counsel was ineffective for failure to object to admission of the stipulation or request a limiting instruction, and the failure of the military judge to give a limiting instruction *sua sponte.*

In his affidavit in response to these allegations, trial defense counsel states that, although the document was used for impeachment purposes, it was hearsay and the

defense "was not about to object to a government exhibit which worked to [appellant's] tactical advantage." After reading the record of trial, we conclude that this stipulation was treated partly as a prior inconsistent statement. The instruction by the military judge was sufficient in limiting the use of the statement for the court. Under these circumstances, counsel's performance concerning this issue was not deficient. *See Strickland,* 466 U.S. at 689. Further, appellant's allegation that the judge was required *sua sponte* to give a further limiting instruction is also without merit.

Trial Counsel Misconduct

Appellant alleges that trial counsel introduced inadmissible evidence regarding appellant's conduct after the shooting, and thereafter made impermissible arguments based on that conduct. He further alleges that defense counsel was ineffective in failing to object to these actions.

Addressing the allegation concerning appellant's conduct after the shooting, his conduct before and after the shooting was relevant to show intent. Acts preceding or following an offense may be used when relevant for a specific purpose, such as to show intent and are admissible. *See* Mil. R. Evid. 404(b); Fed. R. Evid. 404(b); *see also United States v. Sechley,* 12 C.M.R. 119 (C.M.A. 1953) (accused's indifference after shooting considered to show premeditation). Consequently, repeated objection to this evidence would have had no useful purpose.

Because appellant's actions subsequent to the shooting were relevant, trial counsel's references to these acts in argument were not improper. Accordingly, defense counsel was not ineffective in failing to object.

Staff Judge Advocate's Recommendation

Finally, appellant asserts that the staff judge advocate's recommendation failed to discuss the court members' recommendations for clemency. The facts pertinent to this issue are as follows. The staff judge advocate signed his recommendation on 6 March 1990. On 13 March, appellant's counsel submitted a request for clemency which included allegations of legal error and the recommendations of four court members that no confinement in excess of twenty-five years be approved. On 20 March 1990, the staff judge advocate prepared an addendum to his recommendation to the convening authority, stating that appellant submitted matters alleging legal error and seeking clemency. The staff judge advocate stated he disagreed with the allegations of legal error and continued to support his original recommendation. Also, on 20 March 1990, the staff judge advocate executed a memorandum for record indicating that, before taking action, the convening authority considered appellant's submissions, to include the four separate clemency requests of the court members. On 20 March, the convening authority took action by reducing the confinement to forty years but otherwise approved the sentence.

The recommendation of the staff judge advocate is required to contain the findings and sentence adjudged; a summary of the accused's service record, to include length and character of service, awards and decorations, and nonjudicial punishment and prior convictions; the nature and duration of any pretrial restraint; action required under a pretrial agreement or reason for noncompliance; a specific recommendation as to action by the convening authority and, when legal error is alleged in matters submitted by the appellant, a response to the allegation. Manual for Courts-Martial, United States, 1984, Rule for

Courts-Martial 1106(d)(3) and (4) [hereinafter R.C.M.]. The staff judge advocate may include any additional matter deemed appropriate. R.C.M. 1106(d)(5). The defense may submit to the convening authority clemency recommendations by any members of the court. R.C.M. 1105(b)(4). Under R.C.M. 1106, the convening authority must consider any matters submitted by the accused under R.C.M. 1105, R.C.M. 1107(b)(3)(A)(iii).

In the case before us, the staff judge advocate prepared his recommendation in compliance with R.C.M. 1106. Defense counsel submitted matters in response. The staff judge advocate then responded to the allegation of legal error by a statement of disagreement, as required by R.C.M. 1106(d)(4), and continued with his original recommendation. The convening authority received and considered the matters submitted by appellant, to include the petitions for clemency, in compliance with R.C.M. 1107(b)(3)(A)(iii). Contrary to appellant's assertions, nothing more was required. Contrary to his complaint, these important matters were before the convening authority. There is no merit to appellant's assertion.

The allegations of error, to include those raised by appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), are without merit.

The findings of guilty and the sentence are affirmed.

FOR THE COURT:

/s/ William S. Fulton, Jr.

WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX F

Although I believe that the killing of PFC Haney was premeditated, I do not believe that PFC Hoskins requires a sentence to life imprisonment. He had no prior record of criminal misconduct and no problems with his supervisors. There was no evidence that he is a "bad seed" or likely to commit similar acts in the future. He knew that he had done wrong and expected to be punished. I believe that the Convening Authority's ability to approve clemency offers PFC Hoskins an opportunity to prove himself, and I do not perceive PFC Hoskins to be a lost cause. I believe that a full prison term of ten years, exclusive of parole, would ensure that he does not commit such an act again.

13 MAR 90 /s/ Megan C. Jans

(date)

MEGAN C. JANS
MAJ, AV
Court Member

I believe that the killing of PFC Haney was premeditated, but I did not know that there was a mandatory sentence of life imprisonment, and I believe that such punishment would be excessive in this case. PFC Hoskins' previous record and his attitude show that he can be rehabilitated. He is young, was active in school, and had a good reputation. There was no evidence that he was a problem soldier, that the shooting was predictable, or that it was anything other than a one-time incident which will not recur. PFC Hoskins was not proud of what he had done and did not take the matter lightly. He recognizes the significance of the loss of life and the magnitude of his actions. PFC Hoskins should be punished, and I do not want to play down the sanctity of life. But there is no sense in destroy-

ing Hoskins' life as well, if he can one day make a meaningful contribution to society. I concur in the defense counsel's request that confinement be reduced to twenty-five years.

13 MAR 90 /s/ Kevin W. Brown
(date) KEVIN W. BROWN
CPT, AV
Court Member

Prior to findings in this case, I did not know that a guilty verdict meant a mandatory life sentence, and I do not believe that the facts of this case warrant such punishment. Based on PFC Hoskins' prior relationship with PFC Haney, and the lack of any past acts of violence, it appears that the shooting was impulsive and out of character. PFC Hoskins was a young and immature soldier, and I do not believe that he would commit such an act again. Moreover, the tragedy in Nordenham took place in an atmosphere of lack of discipline. I know that soldiers volunteer for that type of mission because of the lack of supervision; and in this case, there was terrible leadership from top to bottom. The first sergeant and platoon leader appeared to have no concept of what was going on, and the soldiers were on their own, both at Nordenham and throughout the unit. Poor leadership did not cause the shooting, but it certainly did not help prevent it. I concur in the defense counsel's request that confinement be reduced to twenty-five years.

13 MAR 90 /s/ John H. Weeks
(date) JOHN H. WEEKS
CSM, USA
Court Member

I believe that life imprisonment would be excessive in this case, due to all the factors in extenuation and mitigation. The shooting occurred in an atmosphere of poor leadership, alcohol use, remoteness of the site, and a lack of senior NCO supervision. More importantly, PFC Hoskins has rehabilitative potential, and I believe that he can one day return to society. Testimony of witnesses such as PFC Hoskins' mother, those who knew him and worked with him, and his chain of command, and also PFC Hoskins' own demeanor in court, indicate to me that this was a one-time incident and that PFC Hoskins does not pose a threat to society. I concur in the defense counsel's request that confinement be reduced to twenty-five years.

13 MAR 90 /s/ Juliette E. Summerville

(date)

JULIETTE E. SUMMERVILLE
SFC, USA
Court Member

APPENDIX G

10 U.S.C. § 852, Article 52, Uniform Code of Military Justice

§ 852. Art. 52 Number of votes required

(b)(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

10 U.S.C. § 918, Article 118 Uniform Code of Military Justice

§ 918. Art. 118. Murder

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard to human life; or

(4) is engaged in the perpretration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

APPENDIX H

Manual for Courts-Martial, United States, 1984

Rule for Courts-Martial 501(a)

Rule 501. Composition and personnel of courts-martial

(a) *Composition of courts-martial.*

(1) *General courts-martial.* General courts-martial shall consist of:

(A) A military judge and not less than five members; or

(B) Except in capital cases, of the military judge alone if requested and approved under R.C.M. 903.

Rules for Courts-Martial 1002

Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

Rule for Courts-Martial 1006

Rule 1006. Deliberations and voting on sentence

(a) *In general.* The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) *Deliberations.* Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) *Proposal of sentences.* Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

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(2)

No. 93-1743

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS R. HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause prohibits the Court of Miliary Appeals from remanding a case to a Court of Military Review for reassessment of the sentence.

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OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a) and the opinion of the Army Court of Military Review (Pet. App. 3a-5a) are unreported.

JURISDICTION

The order of the Court of Military Appeals was entered on January 4, 1994. A petition for reconsideration was denied on February 7, 1994. Pet. App. 2a. The petition for a writ of certiorari was filed on May 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court-martial, petitioner was convicted of premeditated murder in violation of the Uniform Code of Military Justice (UCMJ) Article 118, 10 U.S.C. 918 (1988 & Supp. IV 1992), and was sentenced to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to the pay grade of Private E1. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 19a-30a. The Court of Military Appeals set aside the finding of premeditated murder, but it affirmed the specification of unpremeditated murder and remanded the matter to the Court of Military Review for reassessment of petitioner's sentence based on the affirmed findings. *Id.* at 6a-18a. The Court of Military Review reduced the period of confinement to 30 years, *id.* at 3a-5a, and the Court of Military Appeals affirmed that sentence, *id.* at 1a.

1. The evidence at the court martial showed that petitioner and four other members of a military police unit were assigned to guard a shipment of ammunition at a railroad siding near Sythen, Germany. Petitioner and two other members of the detail received authorization to go into town to eat dinner. Contrary to orders, they drank beer with dinner and purchased two bottles of brandy, which they brought back to the guard post and shared with other members of the detail. After drinking, one of the members, Private First Class Haney, began to taunt another member who had become sick. Petitioner told Haney to calm down. They began to argue, and petitioner ultimately pulled out a pistol and shot Haney repeatedly. Haney died from the gunshot wounds. Pet. App. 7a-11a.

2. Petitioner was convicted of premeditated murder and received a sentence that included life imprisonment. See UCMJ Art. 118, 10 U.S.C. 918 (1988 & Supp. IV 1992). Petitioner subsequently requested clemency from the convening authority. See UCMJ Art. 60, 10 U.S.C. 860.[1] He submitted materials to support that request, including letters from four of the six court members who adjudged the findings and sentence in the court-martial. Three of those court members concurred in petitioner's request that the sentence to confinement be reduced to 25 years, while one believed that petitioner should serve only ten years of confinement, "exclusive of parole." See Pet. App. 31a-33a. The convening authority reduced petitioner's sentence to 40 years' confinement, but otherwise approved the adjudged sentence. The Army Court of Military Review affirmed the findings and the modified sentence. *Id.* at 19a-30a.

3. The Court of Military Appeals granted discretionary review. Pet. App. 6a-18a. The court reviewed the evidence and concluded that it was insufficient to sustain petitioner's conviction of premeditated murder. *Id.* at 12a-15a. The court, however, affirmed "this specification to the extent that it alleges unpremeditated murder" and returned the case to the Army Court of Military Review "for reassessment of the sentence based on the affirmed findings." *Id.* at 15a.

The Army Court of Military Review reassessed the sentence on the basis of "the findings affirmed by the

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[1] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings. See UCMJ Arts. 22-25, 60, 10 U.S.C. 822-825, 860.

United States Court of Military Appeals, the entire record, and *United States* v. *Sales*, 22 M.J. 305 (C.M.A. 1986)." Pet. App. 5a.[2] The court ruled that "only so much of the sentence is affirmed as provides for a dishonorable discharge, confinement for thirty years, forfeiture of all pay and allowances, and reduction to Private E1." *Ibid.* The Court of Military Appeals granted discretionary review of that decision and affirmed the modified sentence. *Id.* at 1a.

ARGUMENT

Petitioner contends that the United States Court of Military Appeals violated his due process rights by remanding petitioner's case to the United States Army Court of Military Review for "reassessment" of petitioner's sentence. According to petitioner, UCMJ Article 67, 10 U.S.C. 867 (Supp. IV 1992), requires the Court of Military Appeals either to order a rehearing on the sentence or to dismiss the charges. Pet. 5.[3]

Petitioner is mistaken at the outset in casting his argument in constitutional terms. Petitioner contends that the Court of Military Appeals has misapplied the federal statute—UCMJ Article 67—that describes that court's authority to review decisions of the Courts of Military Review. As this Court has recently observed, an allegation that the government has failed to comply with statutory requirements generally does not qualify as a "constitutional" claim. *Dalton* v. *Specter*, 114 S. Ct.

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[2] The *Sales* decision specifically recognizes that a Court of Military Review may reassess a sentence. *United States* v. *Sales*, 22 M.J. 305, 307 (C.M.A. 1986). See also *United States* v. *Peoples*, 29 M.J. 426 (C.M.A. 1990).

[3] Petitioner apparently relies on the 1988 version of Article 67. His citations to subsections of that Article accordingly do not correspond to ours.

1719, 1725-1727 (1994). That principle is equally applicable here. The claim in this case, as in *Dalton*, is "a statutory one." *Id.* at 1728.

The Court of Military Appeals acted well within its statutory authority in returning petitioner's case to the Army Court of Military Review for sentence reassessment. Petitioner mistakenly suggests that UCMJ Article 67, 10 U.S.C. 867 (Supp. IV 1992), required the Court of Military Appeals to order a rehearing before a new court-martial. See UCMJ Art. 63, 10 U.S.C. 863 (1988 & Supp. IV 1992) (describing the procedure for rehearings). UCMJ Article 67 does not require that result. UCMJ Article 67(d) provides:

> If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

10 U.S.C. 867(d) (Supp. IV 1992). UCMJ Article 67(d) requires a rehearing only if the Court of Military Appeals sets aside the "the findings and sentence"—*i.e.*, the entire judgment—in a case. In petitioner's case, however, the Court of Military Appeals set aside only the finding of guilt on the charge of premeditated murder and "affirmed as to this specification to the extent that it alleges unpremeditated murder." Pet. App. 15a. UCMJ Article 67(e) is applicable to that situation. It provides in pertinent part:

> After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for

> further review in accordance with the decision of the court.

10 U.S.C. 867(e) (Supp. IV 1992). Thus, UCMJ Article 67(e) expressly allowed the Court of Military Appeals to return petitioner's case to the Court of Military Review for "further review," which in this case entailed "reassessment of the sentence based on the affirmed findings." Pet. App. 15a.

As petitioner acknowledges (Pet. 5), there is no question that the Courts of Military Review may reassess sentences as a part of their statutory power to review sentences as "correct in law and fact" (UCMJ Art. 66(c), 10 U.S.C. 866(c)). This Court specifically recognized the authority of those courts to reassess sentences in *Jackson* v. *Taylor*, 353 U.S. 569 (1957), which—as petitioner concedes (Pet. 8)—presents a situation that is "similar" to this case. Contrary to petitioner's suggestion (*ibid.*), Congress has not made changes to the UCMJ since this Court's decision in *Jackson* that have affected the power of the Court of Military Appeals to return a case to a Court of Military Review for sentence reassessment. Compare 10 U.S.C. 867(d) and (e) (Supp. IV 1992) with 50 U.S.C. 654(e) and (f) (1952).

Petitioner specifically acknowledges that "the Court of Military Appeals has remanded the cases of many military members to the Courts of Military Review for sentence reassessment, and petitioner is unaware of any case in which the practice has been challenged on due process grounds." Pet. 6. See *United States* v. *Salcs*, 22 M.J. 305, 307 (C.M.A. 1986). We submit that the Court of Military Appeals' practice has not been challenged because there is no substantial doubt that the practice is permissible. The Court of Military Appeals did not abuse

its discretion in directing the Court of Military Review to reassess petitioner's sentence. In any event, that exercise of discretion, which is largely a fact-based determination, does not present a question warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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